Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, ET AL.,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UNIVERSITY OF PITTSBURGH, TEMPLE UNIVERSITY, WAYNE STATE UNIVERSITY, AND THE UNIVERSITY OF ARIZONA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the putatively "race-neutral" plans in Texas, Florida, and California that grant university admission to high-school graduates who finish in a top percentage of their class provide a basis for striking down the University of Michigan's affirmative action policies as not narrowly tailored to serve the compelling interest in a diverse student body.

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INTEREST OF *AMICI CURIAE*[1]

The University of Pittsburgh, Temple University, Wayne State University, and the University of Arizona have concluded that a diverse student body is a crucial component of a premier education – an education that prepares students to live in a multi-ethnic, multi-racial, and globally interdependent society. The Board of Trustees of the University of Pittsburgh has adopted a policy that commits the University to "ensur[ing] that the full range of opportunities [it provides] are accessible to all segments of an increasingly diverse society"[2] and "[e]nhancing opportunities for enrolling, retaining, and graduating students from underrepresented groups."[3] Temple University, Wayne State University, and the University of Arizona have similar policies.[4]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no entity other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this brief. Letters granting blanket consent to any party filing an *amicus* brief in support of either petitioners or respondents have been filed with the Clerk.

[2] University of Pittsburgh Board of Trustees Resolution (adopted Feb. 24, 2000).

[3] University of Pittsburgh Affirmative Action Committee Mission Statement (approved 1996).

[4] *See, e.g.*, Temple University Policy 04.81.02 (adopted Nov. 14, 1977) (affirming university's commitment to according "students of any race, color, national and ethnic origin" "all the rights, privileges, programs and activities . . . made available to students at the University"), *available at* http://policies.temple.edu/getdoc.asp?policy_no=04.81.02; Wayne State University Mission Statement (adopted Dec. 13, 1985) (recognizing that, "as an urban university," it has "an obligation to develop special avenues that encourage access for promising students from disadvantaged educational backgrounds," including "implement[ing] its curricula in ways that serve the needs of a nontraditional student population that is racially and ethnically diverse"), *available at* http://www.dmac.wayne.edu/MissionStatement.htm; University of Arizona President's Council on Diversity Vision Statement (stating commitment to "eliminate institutional barriers

Because of their strong interest in fostering and maintaining diversity to provide their students the best possible education, *amici* file this brief to explain why the alternative method of obtaining diversity proffered by the Solicitor General is not a viable one in many States and for many public and state-related universities. Percentage plans have even less relevance to private universities. And these plans have never been used anywhere for graduate and professional schools, so they cannot be considered an alternative to the carefully tailored admissions policies at the University of Michigan Law School.

Amici urge the Court to conclude that these plans are not a nationwide solution that renders the carefully considered diversity initiatives at the University of Michigan unconstitutional. Rather, in light of the paramount interest of the States in matters of public education, what policies pass constitutional muster as narrowly tailored must be evaluated in light of the discretion responsible educators at state and state-related universities must have to experiment and to determine appropriate means to achieve diversity in their student bodies, given their unique demographics, educational missions, and policy priorities.

SUMMARY OF ARGUMENT

The existence of percentage plans adopted in Texas and a few other States does not justify a conclusion by this Court that the more nuanced, individualized diversity approaches employed by the University of Michigan are not narrowly tailored. The Solicitor General asserts that percentage plans (1) serve the overriding interest in ensuring educational diversity – an interest that the government does not contend is anything other than compelling – at the University of Michigan and elsewhere; and (2) are race-neutral. With respect, he is wrong on both points.

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to an equitable and diverse educational . . . environment"), *available at* http://w3fp.arizona.edu/pcd/vision.htm.

I. There is simply no basis to conclude that a percentage plan would work to ensure diversity at the University of Michigan or at many other public or private universities. The plaintiffs in these cases provided no evidence of any kind on that point and indeed have rejected throughout this litigation the argument that the Constitution requires such an approach. The Solicitor General's suggestion that analogous plans would be viable around the country finds no support in the record, and is not based upon any testimony by educators as to the feasibility of these plans generally across the Nation or any evaluation of the particular demographic circumstances facing different States. Such an unsubstantiated assertion cannot be regarded as a valid (much less, a dispositive) criticism of the University of Michigan's admissions systems for graduate and undergraduate programs.

Indeed, significant evidence demonstrates that, because of differences between the States, percentage plans are not a one-size-fits-all solution. As the Director of Admissions at the University of Texas has candidly acknowledged, these plans were never designed as a national solution. Even if percentage plans have served the interests in diversity in Texas and Florida – a conclusion that is based on extra-record speculation by the Solicitor General and is subject to significant question empirically – they are not a panacea in other States. For instance, even if the University of Pittsburgh were to guarantee admission to the top 20% of its in-state applicants, that policy would not come close to maintaining a diverse student body at that school. On the contrary, by itself, such a program would ensure admission of only about 23% of the African American students currently enrolled at the campus.

Accordingly, to provide all students with the significant benefits of a diverse educational environment, the University of Pittsburgh, like many other schools, must make individualized determinations of the potential contributions that each applicant may make to the University's academic and social environment, taking into consideration such non-exhaustive factors as test scores, grades, leadership, preparedness, socio-

economics, geography, race, and ethnicity. The Constitution permits state academic professionals to experiment and to tailor diversity initiatives to their particular needs, within the bounds enunciated by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 314-15, 317 (1978); it does not shackle state educators around the country to the one solution that policymakers in a few States have selected.

By recognizing the authority of state and local educators to craft policies responsive to their particular needs within constitutional limits not implicated by the University of Michigan's policies, this Court would be adhering to its long tradition of recognizing the primacy of the States and localities in education. As the Court has long explained, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Adherence to that tradition here would allow individual States to determine the kinds of diversity initiatives that are consistent with their priorities, their demographics, and their schools' educational missions. By contrast, adoption of the Solicitor General's proposal would represent the worst kind of top-down federal mandate – a mandate that forces all localities into the same rigid model, without regard to the unique circumstances that confront educators across our diverse Nation.

Even beyond the limitations of percentage plans in undergraduate education, they have never even been tried for graduate and professional schools, so they have no conceivable relevance to the issues presented in the *Grutter* case. The Solicitor General's extensive reliance on the availability of those plans in his brief in that case is thus misplaced.

Finally, there is significant reason to doubt that these percentage plans have had any significant effect in maintaining diversity even in the few States where they have been tried. Studies by researchers from Princeton and Harvard have shown that students guaranteed admission under these programs were virtually assured of acceptance even without these plans; that minorities below the level of guaranteed

acceptance are harmed under these plans; and that minorities remain heavily under-represented at flagship universities in these States. Given those facts, the Constitution cannot operate as a federal straitjacket to limit the freedom of other States and universities to pursue a different path.

II. The proposals highlighted by the Solicitor General are not, in any event, race-neutral. Policies that are *motivated* by race are not race-neutral, and that is so whether or not the relevant government policy facially accounts for race. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). State decisionmakers adopted these percentage plans because of race-based considerations. Florida policymakers have *conceded* that they chose to guarantee admission to the top 20% of high-school students because research indicated that a 10% or 15% plan would not yield sufficient minority enrollment. The Texas plan was similarly motivated by a significant drop in minority enrollment after the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

Accordingly, these plans do not offer an easy way out of the issues raised by affirmative action. Rather, they are simply another race-conscious way of obtaining some degree of the educational diversity that most educators and policymakers believe is essential to a first-class education. A few States have chosen to use percentage plans as one mechanism for attaining diversity. However, other States and other universities, facing different circumstances, must be free to make different choices that are responsive to their own situations in providing their students the benefit of a diverse education. Consistent with longstanding constitutional tradition, this Court should respect the different choices made by different States and not sanction a single federal race-based solution that negates the authority of States to employ other mechanisms that they have found to be more effective in their circumstances.

ARGUMENT

I. PERCENTAGE PLANS ARE NOT A VIABLE MECHANISM IN MANY CONTEXTS TO SERVE THE COMPELLING INTEREST IN ENSURING DIVERSITY IN HIGHER EDUCATION

A. The Use of Percentage Plans in a Few States Does Not Establish that the University of Michigan's Affirmative Action Plan Is Not Narrowly Tailored.

The Solicitor General claims that the University of Michigan's affirmative action policies are unconstitutional because of the existence of percentage plans of the type used in Texas, Florida, and California. These percentage plans, the Solicitor General argues, provide race-neutral alternatives that would be "efficacious" in ensuring a diverse student body in Michigan. *See* U.S. *Amicus* Br. at 13-21, *Grutter v. Bollinger*, No. 02-241 ("U.S. *Grutter* Br."). The Solicitor General thus does *not* dispute that educational diversity is a compelling state interest – on the contrary, he acknowledges the "paramount" state objective of ensuring an educational environment open to all. *Id.* at 13. Rather, he claims only that, because of the alleged existence of the purportedly race-neutral alternative of the percentage plans, the University of Michigan's affirmative action plans are not narrowly tailored to serve the interest in educational diversity. *See id.* at 18-26.

1. Even assuming that these percentage plans are race-neutral – which they are not, as discussed below – the University of Michigan would have an obligation to employ this alleged alternative to serve its compelling interest only if a percentage plan were an *effective* means of ensuring diversity *at the University of Michigan*. *See United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion) (in determining whether challenged action is narrowly tailored, Court considers factors including efficacy of alternatives); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) ("[t]o satisfy strict scrutiny," State must show that classification on the basis of

alienage "furthers a compelling state interest by the least restrictive means *practically available*") (emphasis added); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 622 (1990) (O'Connor, J., dissenting) (policy is not properly tailored when agency ignored available alternative "means of directly accomplishing the governmental interest").[5]

Neither the Solicitor General nor petitioners have made such a showing, nor could they. Indeed, petitioners provided *no* record evidence that such plans would be effective at the University of Michigan, although they had ample opportunities to do so had they believed that such plans would be an effective, race-neutral solution in the context presented here. For his part, the Solicitor General leaps from the assertion that these plans have been successful at a few schools in a few States to the conclusion that they will work in Michigan, Pennsylvania, Arizona, and everywhere else around the country. But the Solicitor General's speculation on this point is no substitute for record evidence as to the efficacy of such alternatives *at the University of Michigan*. By itself, petitioners' decision not to present such evidence precludes the claim that such plans are an effective alternative here. *See Paradise*, 480 U.S. at 174-175 & 177 n.28 (plurality opinion) (rejecting alternative proffered by the government in part because "[t]his alternative was never proposed to the District Court"). *See also Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (declining to consider argument by *amicus* waived by party).

2. In any event, the Solicitor General's analytical leap is not only wholly unsupported; it is incorrect. All States, and all universities, are not alike. The 50 States are diverse in their demographics and in the educational missions and selectivity of their public and state-related universities. There

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[5] In this regard, it should be noted that the University of Michigan did consider race-neutral alternatives in both its undergraduate and law school admissions programs and found them insufficient to serve the compelling interest in diversity. The Sixth Circuit in *Grutter* and the district court in *Gratz* agreed with that conclusion. *See* Pet. App. 33a-34a, No. 02-241; Pet. App. 40a-42a, No. 02-516.

is simply no basis for this Court to mandate a one-size-fits-all strategy in the absence of any evidence that such an approach will in fact work in all States and all localities, or for all universities.

Indeed, the percentage plans in place in Texas and elsewhere were never *designed* as national solutions, but rather as responses to the particular circumstances facing those States, given their demographics, the level of segregation in their high schools, and the goals of their university systems. The Director of Undergraduate Admissions at the University of Texas has forthrightly acknowledged as much. As he has explained, the Texas legislators who drafted that State's 10% plan "*weren't thinking nationally*"; instead, "[t]hey were thinking: 'What can we do *in Texas* to still have diverse universities?'" Jodi S. Cohen, *U-M: Texas Plan Won't Work; State's Racial Pattern, Outside Enrollment Would Scuttle It*, Detroit News, Jan. 24, 2003, at 6A (emphases added). Thus, even assuming that these plans serve the compelling interest in diversity at public universities in Texas, they are not a solution for many state universities (and, indeed, their relevance to private universities is even further attenuated).

The University of Pittsburgh provides a clear example in this regard. Unlike in Texas, where the *majority* of the school-age population is Hispanic and African American,[6] minorities (including Asian Americans and Native Americans) make up only 16% of the twelfth-grade students in the State of Pennsylvania.[7] Given the limited number of minority students who graduate from Pennsylvania high schools in any given year, there is only a small pool of in-state minority

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[6] *See* Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 6-7 (Jan. 21, 2003) ("Tienda, *Closing the Gap*"), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

[7] *See* National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=2&view=State.

applicants to the University of Pittsburgh who finished at the top of their high-school class.

In 2002, for example, only 232 African American students who had graduated in the top 20% of their Pennsylvania high-school class applied to the University of Pittsburgh, 187 of whom were accepted, and 64 of whom enrolled. Because a number of public secondary schools (and most private secondary schools) in Pennsylvania do not rank students, the University of Pittsburgh received an additional 199 applications from African American students without a class ranking, 61 of whom were accepted, and 20 of whom enrolled. Thus, even including these un-ranked students, a percentage plan would only ensure the University of Pittsburgh less than one-quarter of the 363 African American students who actually enrolled in 2002. Consistent with this evidence, experience has demonstrated that the University of Pittsburgh must make individualized decisions about students who fall below the top 20%, and, to maintain a diverse student body, at times must take race into account (among a number of factors) in evaluating those students. Importantly, moreover, the fact that the University of Pittsburgh has enrolled approximately 30% of the high-ranking in-state African Americans who it has accepted demonstrates that extensive competition exists among the best universities in Pennsylvania and throughout the country for the same limited pool of high-ranking minority students.

The percentage plans advocated by the Solicitor General have even less relevance in other States with even more limited demographic diversity. In Minnesota, for example, there were only approximately 6,400 minority high-school graduates in 2002. Information from the University of Minnesota indicates that only 302 in-state minority students who graduated in the top 10% of their class applied to that university's flagship Twin Cities campus last year, 290 of whom were accepted, and 178 of whom eventually enrolled. Even at the level of the top 25% of in-state high-school graduates, there were only 636 minority applicants, 608 acceptances, and 360 enrollments at the Twin Cities campus. By contrast, in 2002,

959 minority students actually enrolled at that campus. Accordingly, a plan under which the University of Minnesota accepted the top 25% of graduating in-state students would guarantee only 37% of the university's current minority enrollment.

The pool of minority students at the top of their high-school classes is even smaller in the State of Iowa. In 2002, there were only 428 minority students in the entire State who, according to self-reporting at the time of the ACT test, were in the top 25% of their high-school class. Moreover, information from the University of Iowa indicates that it received applications from only 62 in-state minority students who had finished in the top 10% of their graduating class. By contrast, more than 4,000 first-year students enrolled at the University of Iowa in 2002.

Although the demographics in Arizona are very different than in Iowa, the University of Arizona has special concerns with the imposition of a percentage plan along the lines followed in Texas, Florida, and California because of the variety of racial and ethnic groups in the State and their distinctive historical traditions, socio-economic circumstances, and residential patterns. For instance, approximately 6.2% of twelfth graders in Arizona are Native American, and 26% are Hispanic.[8] Both of those groups bring unique backgrounds, histories, and experiences that enrich university life and that should be reflected in a diverse student body. A one-size-fits-all approach that ignored those differences – occasioned by such influences as residential patterns and the prevalence of tribal lands – could leave some groups behind and result in disproportionate effects on some racial minorities. Any constitutional rule adopted by this Court that too severely cabined the discretion of state decisionmakers could therefore hinder Arizona's compelling interest in reflecting the true

[8] *See* National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=1&view=State.

diversity of the State's population at its premier institutions of higher education.

3. Even aside from the impossibility of relying upon a percentage plan as a basis for ensuring a diverse student body at many universities, these plans are inconsistent with the missions of many institutions. These plans deprive the schools of the ability to judge applicants as individuals and may compel the admissions of students who are not as academically prepared to do the work at a selective institution as other, lower ranking students. In fact, as the statistics noted above indicate, the University of Pittsburgh admits most, but not all, minority (and non-minority) students who are in the top 20% of their class, and admits many minority (and non-minority) students who finish out of the top 20% of their class. The school thus makes individualized judgments of the capabilities of all students, relying on more than just their high-school class rank.

Indeed, while the Solicitor General makes the ironic – and inaccurate – assertion that, under percentage plans, students are treated "as individuals" (U.S. *Grutter* Br. at 21), in fact those plans rely solely on one indication of a student's abilities. Such a system ignores evidence demonstrating that a student who ranked highly at a less competitive high school may not be prepared to do the work at a premier university and, conversely, that a student who did less well at a highly competitive high school would in fact succeed at the same university.

For instance, in Florida, at 75 high schools, students could have a C+ average and be in the top 20% of their class; at other, more competitive schools, students with 3.9 GPAs who have taken multiple Advanced Placement classes would not fall in the top 20%. *See* Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* Chronicle of Higher Education (June 2, 2000) ("Selingo, *What States Aren't Saying*"), *available at* http://www.bamn.com/ce/2000/000602-che-x-percent.txt. In Philadelphia, the part of Pennsylvania with the highest concentration of African American students,

the State has assumed direct supervision over the school system because the education provided by the district was deemed to be so inadequate in preparing students.[9] Indeed, in 2002, Temple University had 334 applicants who were in the top 10% of Philadelphia public schools (other than magnet schools), and 146 of those applicants had combined SAT scores of 800 or less. Thus, there can be no assurance that students who finish at or near the top of their class at some Philadelphia schools are as academically ready to succeed at the more competitive colleges in the State, including the University of Pittsburgh and Temple University, as are students from other schools who finish below the top quartile.

4. At the graduate level, there is no basis for the Solicitor General's heavy reliance on the percentage plans as a viable alternative. *See* U.S. *Grutter* Br. at 14-18. No State has used such a plan for graduate or professional school admissions, and there is no evidence of any kind that they would serve the compelling interest in a diverse student body. Indeed, it is difficult to conceive how an analogously framed percentage plan for graduate school admissions could in any way address diversity concerns. The Solicitor General's reliance on such plans as a supposed race-neutral alternative in the graduate school context thus lacks any foundation in real-world facts.

B. The Constitution Permits State and Local Educators To Determine Appropriate Diversity Strategies and Does Not Mandate a Single Federal Solution

Because there is no one policy that will serve the needs of all colleges and universities in all places, educators and local policymakers have latitude under the Constitution to decide upon strategies that work in their particular environments. As the Court has recognized, local policymakers and professionals are best suited "to evaluate the substance of the

[9] Connie Langland, *The State Takes Over, Budgets Get Tighter, N.J. Redefines the "Abbott" Case*, Phila. Inquirer, Mar. 3, 2002, at P4.

multitude of academic decisions that are made daily by faculty members of public educational institutions." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985). Accordingly, as Justice Powell properly noted in *Bakke*, universities must have "wide discretion" in making admissions decisions so long as they treat each applicant as an individual and look at the combined qualifications of each applicant, not just his or her race. *Bakke*, 438 U.S. at 314, 317 (opinion of Powell, J.).

Justice Powell's insight in *Bakke* accords with this Court's long tradition of respecting the paramount role that the States play in education. As the Court stated in *Brown v. Board of Education*, 347 U.S. 483 (1954), "education is perhaps the most important function of state and local governments." *Id.* at 493. Federal courts' "lack of specialized knowledge and experience" in educational policy counsels against "interference with the informed judgments made at the state and local levels" in this area of historic state control. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (Powell, J.). Accordingly, the proper federal court role in higher education is not to impose one choice over another in determining how to serve a compelling interest, but rather to act interstitially, serving as a brake when a particular approach clearly violates federal law. *See Board of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991).

The Solicitor General's proposal is inconsistent with these principles. He suggests that, on the basis of alleged success in a few States, the Court should hold that Michigan's very different choice is unconstitutional. Implicit in that suggestion is that, regardless of local priorities and demographics, *all* States must use the same strategy should they choose to pursue diversity in higher education. Acceptance of that proposal would constitute a massive federal intrusion into a core area of State decision-making. Neither the evidence in this record nor this Court's precedents establishing the limited federal role in public education indicate that such a result is compelled by the constitutional requirement of narrow tailoring.

C. There Is Significant Evidence that Percentage Plans Do Not Serve the Compelling Interest in Educational Diversity Even in Texas, Florida, and California

This Court need not determine whether in Texas and other States percentage plans have successfully maintained the "atmosphere of speculation, experiment, and creation" that is both "essential to the quality of higher education" and "widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (internal quotation marks omitted). It is worth stressing, however, that there is substantial academic research indicating that these plans have done little or nothing to maintain a diverse student body even in Texas, Florida, and California.

For instance, Princeton University Professor Marta Tienda and a team of researchers have carefully studied the Texas plan and concluded that, even before the adoption of this plan, students ranked in the top 10% of their high-school class are "virtually ensured admission" at both the University of Texas and Texas A&M. Tienda, *Closing the Gap* at 15-16; *see id.* at 41-42 (effects on top 10% students are "trivial"). The chief effect of this plan is thus on students who are *below* the top 10%. There, Professor Tienda and her colleagues found that the evidence demonstrates that admission probability of African Americans and Hispanics has *fallen* by 8 to 12 percentage points. *See id.* at 26. As they explained, the statistical evidence shows that "students ranked below the top decile of their senior class who were admitted pre-*Hopwood* and are at risk of post-*Hopwood* rejection are significantly more likely to be African American or Hispanic, and less likely to be white." *Id.* at 31; *see id.* at 42 (analysis "reveals that African American and Hispanic students are disproportionately at risk of rejection, not acceptance, under the top ten percent policy").

The Solicitor General's defense of these plans as enabling a return to pre-*Hopwood* levels of minority enrollment is also not persuasive, even on its own terms. *See* U.S. *Grutter* Br.

at 14-15. The Solicitor General uses 1996 as a baseline for his argument, but ignores the fact that minorities were extremely under-represented at the flagship Texas universities in that year. For instance, minority enrollment at the University of Texas in 1996 (14% Hispanic, 4% African American) was far below the percentage of minorities in the Texas school-age population. Indeed, even by 1990, Hispanics alone were 31% of the school-age population in Texas. *See* Tienda, *Closing the Gap* at 6-7. Hispanic and African American population growth has skyrocketed since then, and minorities now constitute a majority of the school-age population in Texas. *See id.* Holding steady at these low levels from 1996 hardly demonstrates that public universities in Texas are fully open to the State's diverse population. As a Harvard research study recently concluded with reference to Texas (as well as California and Florida), "the gap between the racial distribution of college-freshman-age population and that of the applications, admissions, and enrollments to the states' university systems and to their premier campuses is substantial and has grown even as the states have become more diverse."[10]

Moreover, as the recent Harvard study also concluded, even the ability to maintain those low numbers is not due to the supposedly race-neutral 10% plan – which, as noted, mandates admission of students who almost certainly would have been accepted anyway – but rather to concerted recruitment and scholarship efforts targeted at communities with large minority populations. *See* Horn & Flores, *A Comparative Analysis* at 50-54, 58-59. Indeed, as this Harvard study notes, the University of Texas itself has stated that any success is "due largely to 'increasing recruiting and financial aid for minority students.'" *Id.* at 58-59 (quoting University of

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[10] Catherine L. Horn & Stella M. Flores, The Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 50 (Feb. 2003) ("Horn & Flores, *A Comparative Analysis*"), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf.

Texas News Release, *The University of Texas at Austin's Experience with the "Top 10 Percent" Law* (Jan. 16, 2003), *available at* http://www.utexas.edu/admin/opa/news/03news releases/nr_200301/nr_toptenpercent030116.html).

Similar evidence rebuts any notion that the Florida "Talented 20" plan has maintained or improved minority representation in higher education. Rather, as a companion Harvard study has concluded, this plan has had an "inconsequential" effect.[11] Even before the program was put in place, many state universities (including Florida State University) had abandoned affirmative action, making comparisons of before and after figures less meaningful. *See* Marin & Lee, *Appearance and Reality* at 37. Moreover, as in Texas, even before this program, students who graduated in the top 20% of their high-school class would be virtually guaranteed admission to a university within Florida's state university system. *See id.* at 21 ("very few students in the Talented 20 needed this policy"). In any event, the Talented 20 program has disproportionately benefited white and Asian students who are not under-represented minorities in the Florida university system. *See id.* at 24. Fewer than 150 additional African American and Hispanic students in the entire State are made eligible by the plan, and even then they are not guaranteed admission to the most competitive, flagship schools (the University of Florida and Florida State University) but simply to one school in the system. *See id.* at 22. And any gains that have been made appear to stem from continued race-conscious recruiting and scholarships, not the Talented 20 program. *See id.* at 34.

In California as well, there is no basis to conclude that the percentage plan has ensured diversity. First, even though African Americans and Hispanics make up approximately 46%

[11] Patricia Marin & Edgar K. Lee, The Civil Rights Project, Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 36 (Feb. 2003) ("Marin & Lee, *Appearance and Reality*"), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf.

of the school-age population in California, in 2001, the first year the percentage plan was in place, only 17% of percentage plan admissions were Hispanic and only 2% were African American. *See* Horn & Flores, *A Comparative Analysis* at 26, 42-43. Moreover, since 1995, both African American and Hispanic freshman enrollments have declined significantly at both the University of California at Berkeley and UCLA, the State's two most selective institutions. *See id.* at 48-49. For instance, Hispanic enrollment at Berkeley dropped from 16.9% to 10.8%, and African American enrollment fell from 6.7% to 3.9%. *See id.*

II. THE PERCENTAGE PLANS THAT A FEW STATES HAVE ADOPTED TO INCREASE MINORITY ENROLLMENT ARE NOT RACE-NEUTRAL

A. Policies that Are Motivated by Race Are Not Race-Neutral

Contrary to the Solicitor General's suggestion, the percentage plans adopted by a few States are not race-neutral. Even a facially-neutral law that is adopted with a race-based intent is subject to scrutiny under the Equal Protection Clause. A "racial purpose" need not "be express or appear on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241 (1976). Rather, a law "neutral on its face" but motivated by racial considerations is subject to the same strict scrutiny accorded to government practices that draw express racial classifications. *Id.* As this Court explained in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), "intent" for purposes of the Equal Protection Clause "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" its effects. *Id.* at 279. *See also Miller*, 515 U.S. at 913 (government actions are "subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though neutral on their face, they are motivated by a racial purpose or object") (citing *Reno v. Shaw*, 509 U.S. 630, 644 (1993)); *United States*

v. Fordice, 505 U.S. 717, 732-38 (1992) (finding constitutionally suspect a facially neutral minimum test score requirement for entry into Mississippi's flagship universities because the policy had originally been adopted to exclude African Americans from the State's historically white colleges and had present discriminatory effects); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (applying strict scrutiny to referendum because "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes").

B. These Percentage Plans Are Motivated by Race

There is abundant evidence that the percentage plans touted by the Solicitor General as race-neutral were in fact intended to enhance or maintain minority enrollment. Indeed, in Florida, "[a]ides to Gov. Jeb Bush of Florida *admit* they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students."[12] And, if there were any doubt as to Florida's specific intent, the nearly exclusive focus of Florida's *amicus* brief is on the extent of minority enrollment under the Talented 20 program. *See* State of Florida *Amicus* Br. at 9-17, *Grutter v. Bollinger*, No. 02-241 & *Gratz v. Bollinger*, No. 02-516. That emphasis confirms that Florida's purportedly race-neutral program is based on the same racial considerations as Michigan's admissions policies. Florida seeks to accomplish more crudely and indirectly the same goal of educational diversity that Michigan promotes directly by considering race, as well as many other factors, in its admissions processes.

Texas's 10% plan was motivated by similar concerns. In the year after the *Hopwood* decision, the percentage of minority enrollment at the University of Texas at Austin dropped significantly.[13] Texas adopted its plan to boost

[12] Selingo, *What States Aren't Saying*, *supra* (emphasis added).

[13] *See* Lydia Lum, *Minority Rolls Cut by Hopwood*, Hous. Chron., Sept. 16, 1997, at A15.

minority enrollment in the wake of this fallout. The state senator who sponsored the Texas bill explained its purpose as "increas[ing] the number of minority admissions to colleges and universities, which had plummeted with the chill that Hopwood had put on admissions."[14] The State of Texas, moreover, previously acknowledged to this Court that it adopted its 10% program "in an effort to retain diversity's contributions for [its] schools," and further had directed its admissions professionals to consider "eighteen admissions factors, mostly having nothing to do with academics, in the hope that some of these factors will turn out to be proxies that increase the number of minority students."[15] For these reasons, opponents of affirmative action have labeled the Texas 10% plan "unconstitutional because it was adopted to circumvent a federal court decision striking down the use of racial preferences and rewrites admissions criteria to achieve a particular racial mix."[16]

Indeed, many of petitioners' supporters have acknowledged that percentage plans "amount to a thinly veiled system of selecting students by race."[17] One such supporter has stated that the Texas 10% plan "furthers racial diversity on campus because it effectively applies a lower admissions standard to applicants from predominantly minority schools –

[14] R.G. Ratcliffe, *Senate Approves Bill Designed To Boost Minority Enrollments*, Hous. Chron., May 9, 1997, at A1.

[15] Petition for Writ of Certiorari at 18, 19, *Texas v. Hopwood*, No. 95-1773 (U.S. filed Apr. 17, 2001), *available at* http://www.law.utexas.edu/hopwood/hopwoodpetcert.pdf.

[16] Roger Clegg, *Texas's Unconstitutional Experiment*, Wash. Post, Nov. 7, 2002, at A24.

[17] Michael Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, Wash. Post, Jan. 17, 2003, at A12 (quoting statement of Center for Equal Opportunity's Roger Clegg); *see also* Ron Nissimov, *Detouring Toward Diversity: Schools Push Limits of Hopwood Ruling*, Hous. Chron., May 5, 2002, at A1 ("Nissimov, *Detouring Toward Diversity*").

in effect using a race-based double standard to engineer a specific racial mix."[18]

The percentage plans advocated by the Solicitor General are therefore also race-conscious, and thus cannot constitute the kind of race-neutral alternative that would support a conclusion that the University of Michigan's policies are not narrowly tailored. Moreover, there is evidence that, especially in States with demographics that are different from those in Texas, Florida, and California, the "fit" between the compelling state interest in diversity and the percentage plan mechanism is weak, and thus that such plans are less efficacious than the Harvard-type plans endorsed by Justice Powell and adopted by Michigan. We do not mean to suggest that, when considered on the basis of a properly developed record, a particular percentage plan in a particular State would be unable to survive constitutional scrutiny. However, unlike the narrowly tailored admissions standards before this Court, rigid percentage plans effectively preclude States from giving individualized attention both to their applicants and to their own educational mission. Such plans cannot be considered a viable, let alone a mandated, alternative for all universities and all States that make up our Nation.

[18] Curt A. Levey, *Texas's 10 Percent Solution Isn't One*, Wash. Post, Nov. 12, 2002, at A24; *see also* Nissimov, *Detouring Toward Diversity*, *supra* (quoting statement of Center for Individual Rights' Curt Levey that Texas program "is a sham substitute for a racial quota").

CONCLUSION

Amici respectfully urge this Court to affirm the judgments below.

Respectfully submitted,

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